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No. 97-114

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1996

A. MARIA HARRIS,

Petitioner,

v.

ARLINGTON COUNTY, VIRGINIA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY TO BRIEF IN OPPOSITION

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16 pp

QUESTIONS PRESENTED

In claims brought under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* --

1. Whether reassignment of an employee to a position which the employee allegedly does not have the knowledge, skills or abilities to perform is a "reasonable accommodation."

2. Whether reassignment of an employee to a position which aggravates employee's known disability, and, in which employer fails to provide the agreed upon principal accommodations is a "reasonable accommodation."

3. Whether an employee's status as a "qualified employee" is determined in her original position or in the position to which she has been reassigned and in which the employer asserts she does not have the knowledge, skills or abilities to perform.

4. Whether a "qualified employee" loses her protected ADA status by being reassigned to a position which the employer asserts she does not have the knowledge, skills or abilities to perform.

5. Whether, after reassignment to a position which the employer asserts she does not have the knowledge, skills or abilities to perform, an employer's refusal to further reassign the employee to a different vacant position or return employee to her first position when it became vacant is an actionable failure to accommodate.

6. Whether an employee establishes a *per se* failure to accommodate claim upon showing that for 11 month-

period employer failed to provide agreed-upon principal accommodations; employer evaluated employee's performance during that period as warranting termination; and employee was terminated.

7. Whether the application of a *McDonnell Douglas* inferential proof scheme is inappropriate where plaintiff claims failure to accommodate.

8. Whether employee proffers sufficient direct evidence of disability discrimination to survive defendants' motion for summary judgment upon showing that employer, having reassigned employee to a position for which it asserts employee is "unqualified"; which position aggravates employee's known disability; and, in which it fails to provide the agreed upon principal accommodations, terminated employee after refusing employee's accommodation requests to be returned to her first position when it became vacant or to be reassigned to a different vacant position.

9. Whether the application of a *McDonnell Douglas* inferential proof scheme is inappropriate where plaintiff claims retaliation.

10. Whether employee proffers direct evidence of unlawful retaliation upon showing that employer failed to provide reasonable accommodations and discriminated against her subsequent to employee's filing of two Equal Employment Opportunity complaints alleging disability and race discrimination.

11. Whether the court below erred in holding that, on employer's motion for summary judgment on employee's ADA and Rehabilitation Act claims, despite evidence from

plaintiff's superiors and clients that her performance was adequate, absent a showing of bad faith, the employer's decision is conclusive on issue of whether employee was able to perform the essential functions of her job.

12. Whether plaintiff's right to receive prior to termination the fact finding process set forth in the County's regulations for permanent employees is protected by the Fourteenth Amendment.

13. Whether employee proffers sufficient direct evidence of race discrimination under Title VII to survive defendants' motion for summary judgment upon showing that employer accommodated similarly-situated white, disabled co-worker.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF CONTENTS iv
TABLE OF AUTHORITIES v
REPLY TO BRIEF IN OPPOSITION 1

I. THE "REASONABLENESS" OF A REASSIGNMENT ACCOMMODATION INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT... 1

A. Reassignment to a position which aggravates the employee's known disability; for which the employee is allegedly unqualified; and, in which the employer fails to provide the agreed upon accommodations is not a "reasonable" accommodation... 1

B. The County failed to provide Mrs. Harris promised accommodations which were essential to her ability to perform her job, and, her supervisor, Kay West, knowingly evaluated her performance absent her accommodations... . 4

C. The County's position is contrary to the plain language of the ADA... 7

II. WHAT CONSTITUTES "DIRECT EVIDENCE" OF DISABILITY DISCRIMINATION INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT... 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases — Page

Arneson v. Heckler,
879 F.2d 393 (8th Cir. 1989) 9

Mantolete v. Bolger,
767 F.2d 1416 (9th Cir. 1985) 3

Rhone v. United States Department of the Army,
665 F. Supp. 734 (E.D. Mo. 1987) 3

Taylor v. Secretary of the Navy,
852 F. Supp. 343 (E.D. Pa. 1994) 9

Statutes and Rules

42 U.S.C. § 12112(b)(5)(A) 10

REPLY TO BRIEF IN OPPOSITION

I. THE "REASONABLENESS" OF A REASSIGNMENT ACCOMMODATION INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

A. Reassignment to a position which aggravates the employee's known disability; for which the employee is allegedly unqualified; and, in which the employer fails to provide the agreed upon accommodations is not a "reasonable" accommodation.

In its most basic form, one of the important issues of federal law which this case raises is: May an employer, under the guise of providing a reasonable accommodation under the Americans with Disabilities Act ("ADA") and the Rehabilitation Act, reassign an employee to a position for which it asserts the employee is "unqualified"; which position aggravates employee's known disability; and, in which position the employer fails to provide the agreed upon principal accommodations; then fire the employee for alleged inability to perform the position? And further, may that employer refuse the employee's accommodation requests to be returned to her first position when it became vacant, or, to be reassigned to a different vacant position?

The County attempts to deflect scrutiny by asserting that Mrs. Harris has misrepresented the facts. However, it is Counsel for the County who has misrepresented the facts in this case.

The County's principal argument in its opposition is that Mrs. Harris' reassignment to the Eligibility Worker I position was merely a "transfer" and not an accommodation so the statutes do not apply, the reassignment cannot be reviewed under the ADA or the Rehabilitation Act. Brief in Opposition at 8.

The County tries to wish away the documentary evidence

and deposition testimony presented to but ignored by the District Court and the Court of Appeals proving that the reassignment was an accommodation, and *was treated as such by the parties*.

The County baldly asserts that: "without any record support, Harris characterizes her 1992 transfer from her first position as a Job Development Specialist to the EW-I position as an 'accommodation' . . .". Id. And, "[b]ecause the evidence presented did not support the conclusion that Harris' transfer to the EW-I position was an accommodation to her disability, neither the District Court nor the Fourth Circuit considered whether that transfer was a 'reasonable accommodation.'" Brief in Opposition at 9.

Mrs. Harris' *personnel records* prove that she was reassigned as an accommodation. She submitted the following evidence with her Plaintiff's Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment ("Pl.'s Mem. Opp. Summ. J.") which is contained in the Joint Appendix:

- **Reasonable Accommodation Plan** ("RAP") written by Kitty Clark, Selective Placement Program Manager, Personnel Department, dated September 16, 1993, listing "Accommodations Agreed to & Accepted by Agency & Employee." The first item on the list of the agreed-upon accommodations is "Reassignment to a vacant position, DHS/Social Services, Eligibility Worker I, lateral position." (Pl.'s Mem. Opp. Summ. J., Ex. 55, page two.)

- **Memorandum** written by Kitty Clark, dated November 9, 1993, describing the RAP. The "8/11/92 date was when [Ron Carlee] the DHS Director authorized reassignment and transfer to a lateral position as an accommodation." (Pl.'s Mem. Opp. Summ. J., Ex. 57, page one.)

- **Transcript of the deposition of Ron Carlee**, Director of

the Department of Human Services ("DHS") in which department Mrs. Harris was employed, in which Mr. Carlee testifies that the reassignment of Mrs. Harris was an accommodation undertaken in lieu of implementing other planned accommodations set forth in the RAP for Mrs. Harris in her first position. Mr. Carlee testified in his deposition,

> A: . . . My bottom-line conclusion was that there was not going to be a productive working relationship there, and I would consider a transfer in that situation whether there were an EEO complaint involved or not.
> Q: In the case, it was?
> A: That is correct.
> Q: And rather than going through and trying to make do with the other accommodations, you accommodated her by transferring her?
> A: Yes.
> Q: And if she hadn't accepted this position, you, under law, would have been obligated to implement these other accommodations?
> A: Yes. And again, I can't testify to what extent they were or were not implemented at the time.

(Pl.'s Mem. Opp. Summ. J., transcript of Ron Carlee deposition, pages 109-110.)

Mrs. Harris' evidence shows that she was, indeed, reassigned as an accommodation. An employer's duty to provide a reasonable accommodation prohibits reassignment to a position which aggravates an employee's disability. See *Rhone v. United States Department of the Army*, 665 F.Supp. 734, 745-46 (E.D. Mo. 1987) (Rehabilitation Act); *Mantolete v. Bolger*, 767 F.2d 1416, 1423 (9th Cir. 1985).

B. The County failed to provide Mrs. Harris promised accommodations which were essential to her ability to perform her job, and her supervisor, Kay West, knowingly evaluated her performance absent her accommodations.

The County next argues in its Brief in Opposition that even if the statutes apply they *believed* that Mrs. Harris could perform in the position to which they reassigned her; they fully accommodated her in that position; and, since they could not possibly have done anything further to accommodate her in that position they were justified in terminating her, rather than reassigning her. Brief in Opposition at 10 - 14.

Once again, the County misrepresents the record. Counsel for the County asserts that Mrs. Harris cannot cite the record for evidence that computerization of forms was the "most important accommodation," (Brief in Opposition at 11) and that the "undisputed evidence demonstrated that this was never envisioned to be a 'key' accommodation." *Id.*, at 11-12.

Mrs. Harris presented such evidence to the District Court in her Plaintiff's Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment:

- **Handwritten notes** written by Kitty Clark, the County's Selective Placement Program Manager, dated October 23, 1992, which includes the admission, "Technology - lot of forms, w[or]ksheets done manually - *key aspect*."

(Pl.'s Mem. Opp. Summ. J., Ex. 33, emphasis added.)

Mrs. Harris provided evidence that, while the County did provide other accommodations, the County did not provide the one that was *essential* to her ability to perform her position: computerization of the forms. Mrs. Harris provided further proof of the essential nature of the computerized forms accommodation through the County's *own internal memoranda*.

By the County's own admission Mrs. Harris would *not be able to perform* the essential functions of the Eligibility Worker-I position to which she was reassigned without the computerization of the forms. She presented the following evidence with her Plaintiff's Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment:

- **Memorandum** written by Walter Zaumseil, Chief, Bureau of Assistance Programs (supervisor to Kay West, Mrs. Harris' supervisor) dated November 9, 1992. In his memorandum, Walter Zaumseil made the following admissions:

> Last week I met with Lana Curtain regarding using Timm Bentley for the *programming of forms that will be required for the accommodation package* for Maria Harris. . . .
>
> I am requesting we do what is necessary to move on this piece of the accommodation plan as soon as possible. The County should contract for the required programming if existing staff resources cannot be immediately identified. I am concerned for Maria [Harris] because *she is not able to truly begin performing* as [an] Eligibility Worker I, though she is located in space with other eligibility workers. Her being in a state [of] limbo for an extended period of time is also difficult for others working around her and observing her being under utilized because their caseloads are more than double what they should be. Maria is *currently unable and not expected to perform* at the same level as other unit staff.

(Pl.'s Mem. Opp. Summ. J., Ex. 34, page one, emphasis added.)

- **Memorandum** written by Kay West (Mrs. Harris' supervisor) dated June 7, 1993. In her memorandum, stamped "Confidential," Mrs. West made the following admissions:

> I have been increasingly concerned about the pace of work on the forms part of the accommodations for Maria Harris. All of the other accommodations have been in place since April 7, however, there are still only two forms on her PC that she uses.
>
> The original work began on the forms in December. *More than forty forms* were prioritized [out of the nearly 100] and an effort was made to put them on Wordperfect. In February, when the first forms were ready, it was learned that Wordperfect was not the appropriate software for most of the forms. At that time the project was passed to Cynthia Graves to complete, utilizing the Perform software. A goal was set of having all of the forms completed by the end of March. By the end of May, we had several low priority forms, but only two that are frequently used. *Only one of them* was on Perform.
>
> Ms. Harris will be on probation until September 21[, 1993]. This is less than four months from now. *If anything can be done to speed the process of putting the forms on the Perform software, I urge that it be done. Otherwise she will not have sufficient time using full accommodations by September 21 for an adequate evaluation of her performance to be done*. If that happens, I see no alternative to extending her probationary period.

(Pl.'s Mem. Opp. Summ. J., Ex. 49, emphasis added.)

Despite her knowledge that Mrs. Harris needed "full accommodations" and "sufficient time" utilizing them to permit "an adequate evaluation of her performance," *on July 28, 1993, nearly two full months before the September 21 anniversary date noted in the memorandum,* Kay West formally evaluated Mrs. Harris' performance as insufficient for continued employment (Pl.'s Mem. Opp. Summ. J., Ex. 51). While **knowing** that the accommodations had not been provided and that she should not evaluate Mrs. Harris' performance without accommodation, Supervisor Kay West reached the decision that Mrs. Harris' performance as an Eligibility Worker I was inadequate and she should be terminated, and she never varied from that determination.

Despite recognizing that her reassignment was "not . . . a good job match" (Pl.'s Mem. Opp. Summ. J., Ex. 64) as they later termed it, and despite Mrs. Harris' requests to be returned to her first position or further reassigned, the County kept her at the position of Eligibility Worker I until they fired her.

Contrary to the misrepresentations made by counsel for the County, Mrs. Harris' evidence shows that the computerized forms were, in fact, essential to her ability to perform her job and they were her "most important accommodation." Her evidence further shows that her performance was evaluated and the decision to terminate her was made prior to the County's provision of the agreed upon accommodations.

C. The County's position is contrary to the plain language of the ADA.

The County further argues in its Brief in Opposition that they could not possibly have done anything further and termination rather than reassignment was appropriate. This is contrary to the plain language of the ADA which imposes a duty upon employers to provide reasonable accommodation which includes, by definition, reassignment.

An important question of federal law arising from this case

is: what are the parameters of the employer's duty to reassign? Is the duty limited to merely providing a reassignment to a position which aggravates the disability or which is a "bad job match" as characterized by the County in this case? Or does the statute require the employer to consider further reassignment?

Mrs. Harris proffered evidence to the District Court that she performed quite well the duties of her Eligibility Worker I position. She presented the testimony of her back-up supervisor, Maxine Shutter, who testified in her deposition that,

> -- the job requirements for Eligibility Worker I were a four-year degree or four years experience (Shutter deposition, at 38);
>
> -- no employee other than Mrs. Harris had a Master's Degree (*Id.*, at 39);
>
> -- in her experienced opinion, Mrs. Harris was capable of learning the regulations, learning the forms and performing well (*Id.*, at 70);
>
> -- as Mrs. Harris' supervisor she found her questions and progress to be similar to that of other employees (*Id.*, at 71);
>
> -- she had no concern whatsoever about Mrs. Harris' intellectual ability to make judgments and decisions regarding her work (*Id.*);
>
> -- with regard to the non-physical aspects of Mrs. Harris' work, she was equal to or comparable to her co-workers in all things except caseload size (*Id.*, at 82);
>
> -- there is no reason based on her intelligence, judgment, professionalism or work habits for her not to have a full caseload (*Id.*, at 83); and
>
> -- that Mrs. Harris' supervisor, Kay West, never expressed to her any disagreement with her opinion of Mrs. Harris' work (*Id.*, at 85).

(Pl.'s Mem. Opp. Summ. J., transcript of Maxine Shutter deposition.)

Even if, assuming *arguendo*, Mrs. Harris could not perform the requirements of the Eligibility Worker I position to which she had been reassigned, the County had a duty under the statutes to further reassign her to another position. See *Taylor v. Secretary of the Navy*, 852 F.Supp. 343, 345 (E.D. Pa. 1994). Or, it had a duty to permit her to return to her original position. See *Arneson v. Heckler*, 879 F.2d 393 (8th Cir. 1989).

The County asserts, in its Brief in Opposition at 14, that Mrs. Harris failed to identify any vacant positions -- this again misrepresents the evidence presented to the District Court. Mrs. Harris continuously applied for other posted County position vacancies but her applications were regularly rejected. Several of the rejection letters she received in response to her applications were attached to her Opposition to Summary Judgment, including the rejection letter informing her that she was "not qualified" for her own original position as a Job Development Specialist. (Pl.'s Mem. Opp. Summ. J., Ex. 68, 69, 70, 71, 72).

The Rehabilitation Act, which the ADA is modeled after, has been interpreted to require multiple reassignments. The County argues that a duty to reassign exists only if there is an "appropriate" vacant position. Thus, another important federal question arising out of this case is, what is an "appropriate" vacant position and to what extent does the employer have a duty to assist the employee in finding a position within its own organization?

II. WHAT CONSTITUTES "DIRECT EVIDENCE" OF DISABILITY DISCRIMINATION INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

Counsel for the County misrepresented the record when it asserted that Mrs. Harris "did not produce any direct evidence of discrimination." Brief in Opposition at 11-12. Mrs. Harris

presented evidence that her supervisor *knowingly* evaluated her performance in the absence of accommodations. See Section I. B., *supra.*

The Americans with Disabilities Act provides, "the term 'discriminate' includes,

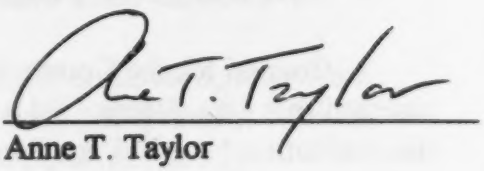
> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

42 U.S.C. § 12112 (b)(5)(A). Thus, by definition, failure to provide a reasonable accommodation *is* disability discrimination. Mrs. Harris proffered direct evidence of disability discrimination when she showed that Kay West, while *knowing* that she should *not* evaluate Mrs. Harris absent her accommodations, did just that, evaluated her performance and recommended her termination, in the absence of accommodations. Mrs. Harris produced evidence, the "smoking gun" memorandum, that proved the existence of the fact, without inference or presumptions, that the County did not make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.

CONCLUSION

This Court should grant this petition for certiorari and set forth a uniform standard to the questions presented.

Date: August 28, 1997



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